No. 89-436

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In The
Supreme Court of the United States
October Term, 1989

KEENE CORPORATION,

Petitioner,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 622,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant interlocutory review on a State Court's pretrial discovery order?

2. Should this Court consider federal constitutional claims which were first raised on appeal and which the State Appellate Courts declined to decide because of their rule against hearing questions not raised in the trial court?

3. Do documents of a party become undiscoverable simply because they have also been produced in a different case in a different court and have been placed under a consent protective order in that other court?

LIST OF PARTIES AND RULE 28.1 LIST

Respondent incorporates the List of Parties and Rule 28.1 List of Petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Keene Corporation,

Petitioner,

v.

Independent School District No. 622,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

STATEMENT OF FACTS

This petition involves one portion of one pretrial discovery order entered by a State Court in Minnesota, in a lawsuit which was filed in 1984 and which has yet to go to trial. Most of the five years of litigation have been spent on discovery and discovery disputes. Numerous motions to compel by respondent have been filed and granted.

In response to several of respondent's requests for production of documents, petitioner refused to provide the specific documents but instead directed respondent to a collection of over four million documents contained in petitioner's record center.[1]

In opposition to the argument that the protective order

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[1] The State Court order which Keene seeks this court to overrule, in addition to requiring the disclosure of material which Keene alleged, but did not establish, was privileged, also overruled Keene's objections to specifying which of the four million documents were responsive to plaintiff's discovery requests. The District Court specifically found that Keene failed to meet the requirements of M. R. Civ. P. 33.03.

issued in the insurance case blocked discovery in this case, respondent pointed out that the language of the protective order itself disavowed any such meaning:

> 6. Nothing in this Order shall be construed in any way to control the use, dissemination, publication or disposition (1) by a producer or designator of documents or information existing in the files of that party prior to the date of the order; or (2) by a producer or designator of documents or information received at any time by that producer or designator outside the course of this litigation. The privileged or confidential status, if any, of such documents or information shall be determined without respect to this order.

The trial court overruled petitioner's objections and ordered the documents produced. Order of February 1, 1989. *See* Keene Appendix A-1. No constitutional claims had been raised in the trial court.

Petitioner's response to this order was to seek discretionary review and a Writ of Prohibition from the Minnesota State Court of Appeals. *See* Appendix A-1, Response to Keene's Petitions. In that appeal, petitioner first raised some of the federal constitutional issues it now wishes to present to this Court. The Court of Appeals declined to review the action by way of appeal, and rejected the petition for a Writ of Prohibition, finding that "Keene failed to establish the Trial Court has compelled disclosure of information which is clearly not discoverable, so as to justify the issuance of prohibition on petitioner's claims of privilege". The Court did not address the constitutional claims. *See* Keene Appendix B-4, Paragraph 9.

Petitioner finally sought review from the Minnesota Supreme Court from the order of the Court of Appeals, which was similarly denied. *See* Keene Appendix C-1.[2]

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[2] Petitioner has also attempted to circumvent the rulings of the Minnesota Courts by filing a 28 U.S.C. § 1983 action in the United States District Court for the District of Minnesota against the School District, its board members and counsel, and the trial court judge. That action sought to enjoin the named defendants from enforcing the February 1, 1989 Order. The United States District Court, Judge Paul A. Magnuson, recognized that Keene's purported civil rights action was merely an attempt to obtain review of the Minnesota Courts' rejection of Keene's privilege claims, and held that it was without jurisdiction to entertain such an action. *See* Keene Appendix

This petition followed.

REASONS FOR DISALLOWANCE OF WRIT

The underlying subject matter of Keene's petition, despite its claims of important federal questions, is merely a pretrial discovery dispute in the Minnesota State Courts. As this Court has held on numerous occasions in the past, such disputes are not subject to interlocutory review by this Court.

Additionally, petitioner failed to raise its purported due process arguments at the trial court level. Consequently, petitioner has failed to preserve these issues for appeal to either this Court or the Minnesota appellate courts. The due process issues are thus inappropriate for review on this basis as well.

Finally, Independent School District No. 622 submits that the issues before this Court, were it to grant Keene's petition, would consist of nothing more than review of the Minnesota courts' application of discovery and privilege rules identical to those in a federal action. Such issues are by no means "special", and are at best "important" only to the parties themselves. Keene has failed to meet its burden under this Court's Rule 17.1, and its petition should be denied.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT INTERLOCUTORY REVIEW OF THIS PRETRIAL DISCOVERY ORDER.

This Court has repeatedly held that it will not grant interlocutory review of pretrial discovery orders. *Cobbledick v. United States*, 309 U.S. 323 (1940), *United States v. Ryan*, 402 U.S. 423 (1971), *Pennsylvania v. Richie*, 480 U.S. 39 (1987). Despite petitioner's attempt to create a constitutional issue out of what is no more than State Court discovery dispute, it cannot avoid the fact that this case is, at this time, not subject to review. This Court should consequently deny petitioner's petition.

D-1, E-1. Petitioner is currently pursuing an appeal of Judge Magnuson's Order in the Eighth Circuit.

II. PETITIONER FAILED TO PRESERVE ITS DUE PROCESS CHALLENGES FOR REVIEW, NECESSITATING DENIAL OF REVIEW AS TO THOSE ISSUES.

As a condition precedent to review of a federal question by the Supreme Court on certiorari from the highest state court, the state court must have "passed upon" the issue itself. *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). *See also Hill v. California*, 401 U.W. 797, 805 (1971), *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 1940). As admitted by Keene in its Petition at page 9, it failed to raise its due process claims until its petitions to the Minnesota State Court of Appeals. Under Minnesota law, issues not presented to the trial court may not be raised for the first time on appeal. *In re: Welfare of K.T.*, 327 N.W.2d 13, 16-17 (Minn. 1982). Petitioner's arguments to the Minnesota appellate courts concerning the right to assistance of counsel, the right to access to the courts, and the alleged irreparable harm threatened were therefore not subject to review. Consequently, the Minnesota appellate courts ignored these issues, and they are not properly before this Court.

III. REVIEW OF THE MINNESOTA COURTS' REJECTION OF PETITIONER'S UNSUBSTANTIATED PRIVILEGE CLAIMS IS NOT NECESSITATED BY SPECIAL OR IMPORTANT REASONS, BUT WOULD MERELY INVOLVE THE REHEARING OF A STATE COURT DISCOVERY MOTION.

Although Keene's petition attempts to dress this garden variety discovery dispute in constitutional clothes, it cannot avoid the underlying fact that each of its arguments is premised on the unsupported assertion that the documents ordered produced are privileged. Consequently, the federal issues petitioner hopes to raise before this Court are non-existent unless this Court were to determine as a preliminary matter that the Minnesota courts' rejection of petitioner's privilege claims was error.

This threshold issue does not involve any interpretation of federal law or the Constitution, and involves no more than the proper application of the law of privilege in Minnesota state court discovery disputes. Resolution of this issue will only determine whether certain specific documents are indeed privileged

as claimed, or whether petitioner met its burden of proving that privilege. While important to the litigants in this case, this state law issue is of no general importance and is not within the scope of issues reviewable under Rule 17.1.

Petitioner's attempt to convince this Court that the Minnesota trial court never rejected its privilege claims (as it granted respondent's motion without opinion) is strained at best. In order to grant the respondent's motion, the trial court necessarily contemplated and overruled these objections as being without merit. Indeed, the Minnesota Court of Appeals denied petitioner's writ of prohibition on the specific grounds that petitioner failed to establish its privilege claims. *See* Keene Appendix B-4, paragraph 9.

Petitioner's additional argument that the respondent made no challenge to its privilege claims misstates the entire substance of the underlying motion hearing. On the contrary, the respondent's written submissions directly refuted Keene's unsubstantiated privilege claims. *See* Appendix B-4. Further, petitioner ignores the fact that in such a challenge, it is incumbent on the party asserting the privilege to substantiate it, not on the discovering party to disprove it. *Sprader v. Meuller*, 265 Minn. 111, 121 N.W.2d 176 (1963); *See also* D. Herr and R. Haydock *2 Minnesota Practice Civil Rules Annotated* § 26.9 (1989).

Further, petitioner's attempt to sidestep these facts by representing to this Court that "it had already made all the record center documents available" (Keene Petition at 7) misstates the substance of the dispute. The insurance litigation documents sought by the respondent are and have always been a discrete subset of documents in Keene's record center. Despite the fact that petitioner had offered to make the four million documents available for inspection generally, it strenuously objected to producing separately those record center documents which it had also produced in its insurance litigation. The Minnesota courts properly saw this objection as an attempt to limit the respondent's discovery to the prohibitively expensive task of reviewing each of Keene's four million documents, and properly rejected this attempt.

The Minnesota courts also could not help but take note of the fact that despite its arguments that the documents sought were "undeniably privileged", petitioner strenuously objected to producing a privilege index for the requested documents. *See* Appendix C-2-3, No. 6. Petitioner's objection necessitated the trial court's February 1, 1989 Order compelling production of

such an index, but petitioner has to date failed to comply. Given petitioner's refusal to substantiate its claim by means of a privilege index, it is difficult to imagine any court sustaining its objections.

Petitioner's repeated objection that the requested documents were placed under seal by the U.S. District Court for the District of Columbia ignores the fact that in entering the order, the Court merely accepted a stipulated order of the parties. Petitioner also ignores the fact that the protective order specifically permits petitioner to disseminate any document which it produced in its insurance litigation or any documents existing in its files prior to the date of the protective order. *See* page 2, *supra*. It further states that it makes no determination that any of the documents are privileged. *id.* Notwithstanding the clear language of the protective order, petitioner has nonetheless refused to separately produce any document produced in that litigation, and has similarly refused to list such documents such that the respondent or the Court could determine which, if any, of the requested documents is indeed precluded from disclosure under the protective order.

In summary, Keene's petition is premised on the validity of its claims that the documents ordered produced are absolutely privileged or under a Federal Court seal prohibiting their disclosure. The Minnesota courts have repeatedly rejected those claims, and there exists no reason to suppose that further review will hold otherwise.

Finally, petitioner's claims that this rejection of unsubstantiated privilege claims amounts to a denial of right to counsel, access to courts, and due process is baseless. Despite petitioner's citation of this Court's opinions involving the denial of counsel in criminal capital cases, the right to a hearing in termination of welfare benefit cases, and the disqualification of a judge due to a relationship to one of the parties, to name but a few, the constitutional rights protected in those cases are simply not present here. The authority is far field from the issue presented here, and does not make petitioner's state law claims of constitutional dimension.

This Court has previously held that it will not grant certiorari to review a decision that rests solely on an analysis of the facts or to determine whether the evidence supports a judgment of another court. *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 503 (1951). Issuance of a writ in this case would result in nothing more than such a review. Keene's petition presents no issues of special importance

to necessitate review, and the respondent thus respectfully requests this Court deny certiorari.

Dated: September 22, 1989.

Respectfully submitted,

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STATE OF MINNESOTA

IN COURT OF APPEALS

Independent School District
No. 622,

Plaintiff,

vs.

Bor-Son Construction, Inc., Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company, and Keene Building Products Corporation);

Defendants,

and

Bor-Son Construction, Inc.

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

PLAINTIFF'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION

APPELLATE COURT CASE NO. C3-89-389

TO: THE COURT OF APPEALS OF THE STATE OF MINNESOTA:

Respondent, Independent School District No. 622 (the "School District"), requests this Court deny Petitioner Keene Corporation's Petition for a Writ of Prohibition dated March 2, 1989.

STATEMENT OF FACTS

On February 1, 1989 the Washington County District Court, Judge J. E. Cass, entered an order in response to the School District's Motion to Compel Discovery and Keene's Motion for a Protective Order (see pertinent memoranda, Keene Appendix 11 and 12, and Respondent's Appendix "B", and Transcript of hearing, Respondent's Appendix "A". The Court's Order overruled unsubstantiated claims of privilege and relevance, required complete and non-evasive responses to interrogatories where the requirements of M.R. Civ.P. 33.03 had not been met, and permitted a limited deposition of a Keene counsel legal assistant with regards to the destruction of certain Keene documents.

Despite Keene's assertions, the Trial Court carefully scrutinized its objections, rejecting their propriety as well as the incorrect factual assertions on which they were based. Keene fails to meet its burden of demonstrating a clear abuse of discretion, and its petition should be denied.

BACKGROUND

The School District has brought suite in tort[1] to recover for the removal of toxic asbestos fireproofing in Tartan High School. This suit is similar to many other asbestos property damage claims brought in Minnesota, and hundreds more nationally. Keene is the successor-in-interest and liability to those companies originally manufacturing the fireproofing product in the building (known as "Pyrospray"), and recently discovered documents reveal that Keene itself manufactured the product as well. Keene has steadfastly insisted that it never manufactured asbestos pro-

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[1] Keene's characterization of this action as one seeking economic loss is a boilerplate assertion made by asbestos product manufacturers when defending these cases. To date, nearly 60 trial courts nationally have ruled on this issue, including 3 in Minnesota. See *In Re: State and Regents Building Asbestos Cases*, Nos. 99081, 99082 (Minn. Dist. Dec. 16, 1988)(Carey, J. who has been appointed by the Minnesota Supreme Court to preside over all asbestos cases pending in Minnesota), *Independent School District No. 709 v. W. R. Grace So.*, No. 155716 (Minn. Dist. May 20, 1987)(Litman, J.), and *Federal Reserve Bank v. Carey Canada et al*, Civ. No. 3-86-185 (D. Minn. Aug. 30, 1988)(Devitt, J.). Of these rulings, no Minnesota trial court and only four courts nationally have accepted Keene's position, and each of the four courts doing so has either been reversed on appeal or overruled in a subsequent trial court opinion within that same jurisdiction.

ducts.

Keene Corporation has attempted to utilize its alleged predecessor status as a shield against discovery, asserting that it need only collect the documents of its predecessors in a central location and allow document inspections. Keene admits that its record center contains over 4 million documents, including an unspecified amount of irrelevant material. In response to plaintiff's discovery in this case, Keene has typically provided no more than self-serving responses accompanied by an offer to produce documents at the record center. Keene does not attempt to specify which documents are responsive to individual requests, potentially necessitating a review of each of the 4 million documents in order to obtain a single response. The School District consequently moved the Trial Court for an order compelling proper responses, which was granted on November 21, 1988. The resulting responses from Keene Corporation were similarly vague and non-responsive and continued to improperly direct plaintiff to its 4 million documents in its record center.

The School District also attempted to avoid the review of this vast number of documents (which Keene itself asserts would cost more than the amount of the School District's claim), and consequently served a Request for Production of certain discrete sets of documents in Keene's possession in August, 1988. This Request included:

1. Specific documents from Keene's record center which had been similarly reviewed by and produced to the United States Government in litigation involving similar issues as in this case,

2. Specific documents from Keene's record center or in possession of Keene's counsel which had been produced in litigation with its insurer which also involved issues present in this case,

3. Any documents Keene relied on in preparing responses to discovery in this case,

4. Keene documents which plaintiff had inspected but which were later withheld on claims of privilege and relevance, and

5. An index of documents Keene refused to produce due to alleged privilege.

Keene objected to providing any of these documents.

Further, the School District noted the deposition of Mr. David Rehbein, a paralegal employed by Keene's national counsel who had testified in Keene's insurance litigation that he had destroyed certain Keene documents. The limited purpose of this deposition was to ascertain which documents had been destroyed and why. The deposition was not to require disclosure of any privileged or confidential material.

Keene ultimately moved for a protective order to prohibit Mr. Rehbein's deposition, and the School District similarly moved to compel responses to that discovery subject to the Court's November 21, 1988 Order, as well as the August, 1988 document requests. Both matters were heard on January 12, 1989.

On February 1, 1989, the Court denied Keene's motion, and similarly ordered Keene to respond to plaintiff's discovery, implicitly rejecting Keene's factual assertions which had been disputed by plaintiffs, and overruling Keene's objections.

ISSUES

1. Whether the Trial Court clearly abused its discretion in rejecting claims that certain documents were privileged and/or under seal when the factual basis for these claims was disputed.

2. Whether the Trial Court clearly abused its discretion in overruling Keene's reliance on M.R.Civ.P. 33.03 where it failed to specify the responsive documents and failed to establish that its burden equaled or exceeded that of the School District.

3. Whether the Trial Court erred in allowing a limited deposition of a Keene legal assistant with respect to the destruction of various documents.

REASONS FOR DENYING KEENE'S PETITION

The issuance of an extraordinary writ is improper in this case where the underlying facts of Keene's privilege and burden claims are in dispute, and where the Trial Court determined that Keene's factual claims were incorrect. This is not a case where the Trial Court ignored applicable law as Keene suggests, but

rather one where it applied the law to the facts as it found them. In such a case, this Court should respect the sound judicial discretion of the Trial Court, who scrutinized Keene's assertions and rejected them.

The Court correctly applied M.R.Civ.P. 33.03 and found that Keene's responses did not meet its requirements. The Court had ample basis for concluding that Keene had not adequately specified the responsive documents, and had also failed to meet its burden of proving that the School District's burden was less than or equal to that of Keene.

The Trial Court was also within its discretion in ordering Keene to produce documents which it claimed were under seal when the evidence revealed they were not. The documents produced to the government were merely copies of a specifically defined subset of those documents in Keene's record center, which Keene did not deny would be produced to the School District if it found them independently. Similarly, the evidence supported plaintiff's assertion that the requested insurance litigation documents were actually in the possession of Keene's counsel and/or in its record center. While copies of some may have been under seal (and are not sought by plaintiff), the Court properly ordered disclosure of those not under seal.

The Trial Court further properly ordered the production of documents relied on in preparing Keene's discovery responses, documents which had previously been produced to plaintiff for inspection but were subsequently withheld, and a privilege index to enable a challenge of Keene's privilege claims. Also, the Court did not in any respect allow the discovery of privileged information when it permitted a limited deposition relating to the destruction of various documents.

The history of this litigation has demonstrated that Keene will oppose any type of meaningful discovery, and its responses and objections are drafted with that goal in mind. The Trial Court has overseen nearly 5 years of such tactics, which have required 5 separate motions to compel. The Trial Court was in the best position to evaluate the merit of Keene's factual assertions, and given the evidence produced by the School District, was well within its discretion in rejecting them.

WHEREFORE, Respondent respectfully requests an Order denying the Petition for a Writ of Prohibition.

Dated: March 9, 1989.

Respectfully submitted,

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

Independent School District No. 622

Plaintiff,

vs.

Bor-Son Construction, Inc.; Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.

Third-Party Plaintiff,

vs.

Corwin, Steppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

File No. C5841701
Property Damage

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO KEENE'S MOTION FOR A PROTECTIVE ORDER

I.

INTRODUCTION

Keene Corporation continues its long-standing tactics to in

response to interrogatory number 37 of plaintiff's third set of interrogatories. Plaintiff served this deposition notice on Keene presuming it would prefer to coordinate the scheduling of an elderly retired employee's deposition with whom plaintiff suspects Keene still has a consulting relationship. If Keene disclaims such relationship and refuses to assist in scheduling the deposition, and if Keene will certify this is still Mr. Wilson's correct address, then plaintiff will happily subpoena him for a deposition at plaintiff's convenience.

B. AS TO THE DEPOSITION OF DAVID REHBEIN AND

C. AS TO THE DEPOSITION OF THE INDIVIDUAL(S) MOST FAMILIAR WITH THE DESTRUCTION AND DISMANTLING OF CERTAIN KEENE FILES

Keene spends the bulk of its memorandum of law arguing against plaintiff's desire to depose Mr. Rehbein. Contrary to what Keene has stated, plaintiff desires to depose Mr. Rehbein on only one narrow, very limited subject area, *to wit*: his involvement with the review, collection, disposal, destruction and dismantling of certain Keene files and records discussed in his August 22, 1984 deposition in the case *Keene Corporation v. I.N.A. et al.*, C.A. 78-1011 (D.D.C.) pages 37-40 and 61-68. Plaintiff does not intend to inquire on a wide array of subjects as Keene apparently fears but rather fully intends to limit its examination to that one area. Thus, Keene's fears about a violation of the attorney client privilege are not well taken.

Plaintiff first learned of Mr. Rehbein's activities as a result of discovery, I.N.A. propounded to Keene after the Rehbein deposition was taken in *Keene v. I.N.A.* (Exhibit J). Since asking this interrogatory in this case, Keene has strenuously opposed Plaintiff's effort to obtain any discovery whatsoever on this particular point.

Plaintiff is entitled to know, *inter alia*, what Mr. Rehbein did in collecting and organizing the documents produced in the insurance litigation, who told him what to do, what they told him to do, who supervised him, how he went about doing it, who participated in those decisions, what evidence was destroyed, and what files were dismantled. Destruction of evidence is highly improper conduct and this court should not allow Keene

to hide behind a hollow plea of attorney client privilege to keep such information from being revealed.

Since Keene has refused to describe the particular passages or produce the Rehbein deposition as sought by plaintiff's interrogatories 1-4 of the plaintiff's third set of interrogatories (Exhibit K), and request for production no. 1 of plaintiff's fourth set of request for production (Exhibit L), plaintiff has sought instead a less desirable alternative -- a limited deposition of Mr. Rehbein. Keene cannot have it both ways; it can't permanently keep Mr. Rehbein silent and hidden away. If Keene will not voluntarily produce its national counsel's personal copy of the Rehbein deposition transcript with exhibits -- which cannot possibly be subject to the protective order -- then this plaintiff should be allowed to pursue limited discovery of Mr. Rehbein about the dismantling and destruction of certain Keene files.

Plaintiff candidly acknowledges that it would prefer to have this court order Keene to produce its counsel's personal copy of the Rehbein transcript and exhibits. By plaintiff's January 4, 1989 motion to compel, plaintiff seeks precisely, this remedy. In fact, plaintiff seeks production of the entire *Keene v. I.N.A.* transcript in that motion. Keene's national law firm, Anderson Russell Kill & Olick, by one of its partners, Mr. Jerold Oshinsky, in the context of other litigation for other clients has openly stated that: "We have the massive Keene record in my office..." (Tr. p. 19, 1.5) *National Gypsum Company v. American Motorist Insurance Company*, CA No. 82-1332, D.D.C. 2/28/84) (Exhibit M).

While parts of the *Keene v. I.N.A.* record are in fact subject to a protective order, this protective order cannot be said to govern a firm's personal copy of that information. This is especially true since the information and documents Keene produced in its insurance litigation came from its New Jersey document repository. This is the same repository to which Keene habitually refers plaintiff for a response to every discovery request propounded. Keene cannot on the one hand invite plaintiff into its document repository and then on the other hand claim privilege to documents so offered. This is criminally contumacious conduct. *Blake Assoc. Inc. v. Omni Spectra Inc.*, 118F.R.D. 283 (D. Mass. 1988). Nor can Keene hide and protect damaging evidence and documents by placing such in the hands of its lawyers. If keene volunteers to this plaintiff access to its documents in its New Jersey warehouse, then it has no grounds whatsoever to claim a protection from disclosure when plaintiff seeks documents from that same original source, but which were ac-

tually produced in another case. This is especially true since an attorney from Keene' national law firm, Mr. Oshinsky, has stated in the context of other litigation on behalf of another client that he has the entire transcript of the *Keene v. I.N.A.* case in his office (Exhibit M).

Keene argues that the deposition and documents plaintiff seeks have no bearing on plaintiff's claims. This contention is not true however. By Keene's own admission, Rehbein's testimony concerns "Keene's claim for punitive damages for bad faith" [Keene memorandum page 6]. A necessary part of this testimony will entail the actions, activities, and special knowledge of Keene *vis a vis* its insurance carrier. Thus, this school district plaintiff and defendant, I.N.A. stand in analogous situations, since both have claimed (for different reasons) that Keene had special knowledge about the harms and hazards of asbestos exposure. I.N.A. has argued this to show superior knowledge lay with Keene and that I.N.A. too was defrauded by Keene's actions and thus should not be responsible for providing insurance coverage under the various policies. This school district plaintiff on the other hand argues Keene's superior knowledge and its failure to warn is one of the reasons it is liable for damages. Unquestionably then, some of the key issues in Keene's insurance litigation are the same as some of the issues in the instant case.

Not all of the documents produced in Keene's insurance litigation are subject to a protective order and thus Keene could easily produce all of the unprotected documents it produced in the insurance litigation. Such documents could easily be copied from Mr. Oshinsky's personal copy of the entire *Keene v. I.N.A.* transcript that he has indicated his firm has. (Exhibit M). Additionally, Keene could produce a privilege index setting forth the identity of those documents to which it now asserts a privilege, or protection under Judge Green's order[1]. Plaintiff believes that Keene should be required to produce such a privilege index for every document it claims is protected from discovery in this case so that a meaningful independent assessment can be made of such claims.

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[1] Judge Green has recently discussed with a Texas state court judge a plan wherein a specially appointed Master in Chancery will proceed to review the entire *Keene v. I.N.A.* transcript for the purpose of selecting relevant documents for production to asbestos personal injury plaintiffs in Texas.

STATE OF MINNESOTA — IN DISTRICT COURT

COUNTY OF WASHINGTON — TENTH JUDICIAL DISTRICT

Independent School District No. 622,

Plaintiff,

vs.

Bor-Son Construction, Inc.; Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation)

Defendants,

and

Bor-Son Construction, Inc.

Third-Party Plaintiff,

vs.

Corwin, Seppenan & Associates, Inc.,

and

Insulation Sales Company,

Third-Party Defendants.

KEENE CORPORATION'S RESPONSE TO PLAINTIFF'S FOURTH SET OF REQUESTS FOR PRODUCTION

File No. C5-84-1701

INTRODUCTION

Keene Corporation ("Keene") has never mined asbestos, nor manufactured, processed, fabricated, sold, distributed, or otherwho

has personal knowledge of the vast majority of the information contained at the document depository. The documents are not sorted by categories. The documents have been made available to plaintiff at Keene's document depository for inspection and copying. See also, Introduction.

4. Produce any and all patent-related documents concerning the product Pyrospray, including but not limited to, a patent-related document from Pearce to Campbell dated August 8, 1970, identified as No. AF005263-67 which was earlier produced for inspection but not copying to counsel for Plaintiff in September of 1987 during his review of Keene's documents in the New Jersey warehouse.

RESPONSE TO REQUEST NO. 4: Documents available in this regard are on file at Keene's document depository in New Jersey and have been made available to plaintiff for inspection and copying. It is Keene's belief that James Campbell, the recipient of No. AF005263-67, was an attorney advising Keene on patent matters. Counsel for Keene is attempting to confirm this information.

5. Produce all documents marked, but not already produced, to Plaintiff's counsel, Charlie Erickson for copying, upon his inspection of documents at Keene's warehouse facility September 21-23, 1987.

RESPONSE TO REQUEST NO. 5: All marked documents were produced with the exception of documents not requested, not relevant to the issues in this action, and no reasonably calculated to lead to the discovery of admissible evidence.

6. Produce an index to every document arguably responsive to any of plaintiff's discovery requests served in this case to which you assert any privilege justifying non-production of the document. This index should include the date of the document, the author addressee, a brief description of the document and the reason purportedly justifying the alleged privilege.

RESPONSE TO REQUEST NO. 6: Keene objects to this request as being unduly burdensome, harassing, or oppressive. Keene objects to this request on the grounds that it is overly broad as to time, scope, or location. Keene objects to this re-

quest on the grounds that it seeks information which is not relevant or is not reasonably calculated to lead to the discovery of admissible evidence.

DATED: September 9, 1988

MASLON EDELMAN BORMAN & BRAND

By s/Mary R. Vasaly

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